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The Honorable Mona Das
State Senator, District 47
232 2nd Avenue S Suite 107
Kent, WA 98032

Dear Senator Das:

By letter previously acknowledged, you have requested an opinion on the following questions regarding initiative signature gathering and RCW 42.17A.555, paraphrased for clarity:

1. **Does RCW 42.17A.555 prohibit initiative signature gathering on city property such as a public plaza?**

2. **If the answer to the first question is yes, may the city or its employees be liable under RCW 42.17A.555 for allowing such signature gathering on city property to occur?**

3. **If the answer to the first question is no, may the city prohibit signature gathering on city property?**

BRIEF ANSWERS

1. The answer will depend on specific facts about the property at issue, but RCW 42.17A.555 likely does not prohibit initiative signature gathering on a public plaza. Whether a city may allow signature gathering on public property depends on whether the signature gathering involves the "use of facilities" as that term is used in RCW 42.17A.555, and, even if so, whether it qualifies for an exception to the general prohibition against use of government facilities for the promotion of a political candidate or ballot proposition. Both are fact specific inquiries. In the case of a public plaza, the mere presence of signature gatherers is not likely to constitute the use of city facilities implicating RCW 42.17A.555. Even if it did, such activity would be permissible if the city makes the plaza available for political use on a nondiscriminatory, equal basis.

2. For conduct that is prohibited by RCW 42.17A.555, city employees may be charged and penalized for violating the statute if they authorize such conduct, or know about the activity

and fail to take steps to prevent it. But again, authorizing the use of a public plaza that is equally available to all for signature gathering would likely not violate RCW 42.17A.555.

3. Yes, the city may prohibit signature gathering on its property that is otherwise permitted under RCW 42.17A.555, so long as it does so consistently with the First Amendment and any other applicable law or constitutional provision. If the property in question is a traditional public forum, or the city has intentionally held it open for public expression, the prohibition would be upheld only if it is narrowly drawn to accomplish a compelling state interest, or constitutes a reasonable and content-neutral time, place, or manner restriction. However, if the property has not been traditionally or intentionally held open for the use of the public for expressive activity, a prohibition would generally be upheld if it is reasonable in light of the purpose served by the forum and is viewpoint neutral.

BACKGROUND

RCW 42.17A.555 is part of Washington State's Fair Campaign Practices Act, which was enacted to promote complete disclosure of all information regarding the financing of political campaigns and lobbying. RCW 42.17A.001. Washington State's Fair Campaign Practices Act applies to city governments pursuant to RCW 42.17A.005, which defines "agency" as including "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17A.005(2).

RCW 42.17A.555 prohibits an elected official or an employee of his or her office to use public funds, and also prohibits the "use of any of the facilities of a public office or agency, directly or indirectly . . . for the promotion of or opposition to any ballot proposition." Any "ballot proposition" includes initiative propositions proposed to be submitted to the voters from the time they were filed with the appropriate election officer before circulation for signatures. RCW 42.17A.005(4).[1]

Facilities include "use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency." RCW 42.17A.555. While "use of the facilities" is not statutorily defined, the Public Disclosure Commission has construed it as follows: "(1) uses of 'facilities', as that term is therein defined, which constitute or result in a measurable expenditure of public funds; or (2) such uses which have a measurable dollar value." *See* AGO 1973 No. 14, at 31.

[1] Whether a ballot proposition exists within the meaning of RCW 42.17A.005(4) and RCW 42.17A.555 is beyond the scope of this question. *See State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 792-96, 432 P.3d 805 (2019) (noting differences between statewide and local initiatives, and concluding ballot proposition existed where measure was actually filed with an election official, prior to signature gathering). This opinion assumes that such a proposition exists.

The Fair Campaign Practices Act sets forth exceptions to this prohibition, including "[a]ction[s] taken at an open public meeting" and "normal and regular conduct" of the entity. RCW 42.17A.555(1), (3). The Commission adopted a rule further fleshing out this statutory exception:

> (1) RCW 42.17A.555 does not restrict the right of any individual to express their own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.
>
> (2) RCW 42.17A.555 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

WAC 390-05-271. The Commission defines "normal and regular conduct of a public office or agency" as follows:

> [C]onduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

WAC 390-05-273.

ANALYSIS

1. A city violates RCW 42.17A.555 if the signature gathering involves "use of facilities" and if the signature gathering does not meet any of the statute's exceptions.

You first ask whether initiative signature gathering by a citizen on city property is prohibited under RCW 42.17A.555, which contains prohibitions on the "use of any of the facilities of a public office or agency, directly or indirectly . . . for the promotion of or opposition to any ballot proposition." Thus, the first question is whether signature gathering on city property involves the "use" of the city's "facilities."

The gathering of signatures on city property would not necessarily be considered the use of a public office's facilities as defined in RCW 42.17A.555. "Facilities" under that statute "include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency." The statutory phrase "including, but not limited" generally indicates that additional items not listed are included only when they are similar to the specific items listed. *State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015).

The list in RCW 42.17A.555 suggests that the use of public facilities does not include the mere presence of persons on public property, because that scenario is not similar to the enumerated items listed: the use of office supplies, office equipment, and the specific use of the physical space of an office. *See Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 427, 423 P.3d 223 (2018). Further, because the Commission has construed "use of facilities" as involving a measurable dollar value, the presence of a signature-gatherer on city property that is not rented out for private events or is otherwise open to public expression likely does not involve use of facilities. *See* AGO 1973 No. 14. However, the use of a copier, or access to restricted office space that could otherwise be rented out, may constitute "use of facilities." Thus, using your example, the presence of signature gatherers in a public plaza may not even constitute "use of facilities" under RCW 42.17A.555.

Even activity that involves "use of any of the facilities" may nonetheless be permitted under RCW 42.17A.555 if the activity is "part of the normal and regular conduct of the office or agency."[2] RCW 42.17A.555(3). The Commission has further clarified that "RCW 42.17A.555 does not prevent a public office or agency from . . . making facilities available on a nondiscriminatory, equal access basis for political uses . . . if such action is part of the normal and regular conduct of the office or agency." WAC 390-05-271(2). Thus, the next relevant question would involve consideration of whether signature-gathering on public property constitutes "part of the normal and regular conduct of the office or agency." "Normal and regular conduct" of a public office or agency, as that term is used in the RCW 42.17A.555, means conduct which is "(1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner." WAC 390-05-273.

The Court of Appeals has analyzed whether a use was authorized under this exception in at least two cases. First, in *Herbert v. Public Disclosure Commission*, 136 Wn. App. 249, 255, 148 P.3d 1102 (2006), the Court found a teacher's conduct of using the school district's email and

[2] Additionally, even if an activity is considered to be a part of the statutory definition of "use of facilities," it would still not violate RCW 42.17A.555, if it meets one of the other statutory exceptions which are not relevant here.

mailboxes for the purposes of promoting a ballot measure was not authorized by any constitutional, charter, or statutory provision, and that the school district's computer policy specially prohibited this use. Thus, it did not meet the normal and regular conduct exception. *Herbert*, 136 Wn. App. at 255. Second, the Court in *King County Council v. Public Disclosure Commission*, 93 Wn.2d 559, 562-63, 611 P.2d 1227 (1980), found that a vote by four members of the county council to endorse a ballot measure was "normal and regular conduct" because (1) the council historically supported or opposed other ballot measures, and (2) King County's charter provided that the county council may determine policy for the county and may pass motions to make declarations of that policy.

This office has issued several opinions pertaining to whether conduct is "normal and regular" for purposes of RCW 42.17A.555. *See* AGO 1973 No. 26 (a school district did not violate RCW 42.17.130, which is now codified at RCW 42.17A.555, when it allowed others to use district facilities for meetings at which people spoke in favor of or against pending ballot proposals because school districts have statutory authority to provide school facilities to others for meetings); *see also* AGO 1975 No. 23 (while it is not considered "normal and regular conduct" for an elected official, at public expense, to campaign actively for or against a ballot proposition, if the proposition relates to the official functions of the elected official's office and the purpose of the communication is to explain the measure in relation to those functions, it would be "normal and regular conduct").

In the context of signature gathering on a public plaza, such use is likely to meet the "normal and regular conduct" exception if a city allows other public expression on the property. As explained below in response to your third question, some government property serves as a forum for expressive activity, and the First Amendment prohibits the government from unreasonably restricting or discriminating against certain expressive activity on government property when other such activity has been permitted. Thus, if the public plaza is a forum for other political or expressive activity, then allowing persons to gather signatures in support of a ballot proposition would likely be considered part of the normal and regular conduct of the city.

In sum, a city likely would not violate RCW 42.17A.555 by permitting the collecting of signatures for an initiative on a public plaza, because the mere presence of signature gatherers in a public plaza is not likely to constitute use of public facilities as defined in RCW 42.17A.555. Additionally, even if signature gathering did involve the use of city facilities, it may still be permitted if it is part of the normal and regular conduct of the city. As the Commission explained in its rule implementing RCW 42.17A.555, "RCW 42.17A.555 does not prevent a public office or agency from . . . making facilities available on a nondiscriminatory, equal access basis for political uses . . . if such action is part of the normal and regular conduct of the office or agency." WAC 390-05-271(2). It is the normal and regular conduct of certain government entities to permit political activity and public expression on certain government property. Thus, such activity, even if it constituted use of city facilities, would not necessarily violate RCW 42.17A.555.

2. If conduct is prohibited by RCW 42.17A.555, city employees may be penalized for violating the statute if they authorize such conduct.

You also ask what liability, if any, a city or its employees might have if initiative signature gathering takes place on city property but no one takes action to stop or prevent it. This question assumes that the activity in question violates RCW 42.17A.555 (unlike the example considered above of the public plaza). In such cases, I conclude that if city employees authorize the use of facilities for a prohibited purpose, such employees may incur liability under RCW 42.17A.555. That statute prohibits elective officials and employees from "authoriz[ing] the use of any of the facilities of a public office or agency, directly or indirectly . . . for the promotion of or opposition to any ballot proposition." Thus, liability may be found under RCW 42.17A.555 where a city employee is aware of a misuse of facilities and fails to take steps to prevent it. *See In re the Matter of Enforcement Action against Steve Hall*, PDC Case No. 59039 (in which the Committee based the violation of RCW 42.17A.555 on respondent's authorization of the use of city facilities).

The Commission "may initiate or respond to a complaint" of violations of Washington State's Fair Campaign Practices Act, conduct a hearing with regard to any violation, and issue and enforce an order for civil penalties and potential criminal prosecution for violation of the Act. RCW 42.17A.755(1).[3] Further, any potential violation can also be referred by the Commission to the Attorney General's Office for a penalty greater than the Commission's penalty authority and a person can bring a citizen's action in the name of the State pursuant to the statutory requirements. RCW 42.17A.755(4)(b), .775. Ultimately, whether any action violates the State's Fair Campaign Practices Act is dependent on case-specific facts.

3. A city may prohibit signature gathering on city property so long as it does so consistently with the First Amendment.

Finally, you ask if a city may prohibit signature gathering on city property even if RCW 42.17A.555 *does not* prohibit this activity. Because signature gathering for the purpose of initiatives is an expressive activity protected by the First Amendment, *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 239-40, 635 P.2d 108 (1981), the answer depends on whether the restrictions imposed by the city comply with the First Amendment. This first necessitates an analysis of whether the property is a "public forum"—in other words, a space

[3] The Commission adopted a penalty schedule for specific violations of the Fair Campaign Practices Act that may be agreed to between the Commission and the alleged violator. WAC 390-37-062. Further, the Commission may refer limited violations for criminal prosecutions if a person "with actual malice, violates a provision of this chapter" or if a person "within a five-year period, with actual malice, violates three or more provisions of this chapter[.]" RCW 42.17A.750(2).

generally open to expression that is protected under the First Amendment. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). If so, the restriction would need to pass heightened scrutiny, involving an analysis of whether it is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *Collier v. City of Tacoma*, 121 Wn.2d 737, 748, 854 P.2d 1046 (1993); *see also Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). Government may impose reasonable time, place, or manner restrictions, even in a public forum, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). If a public forum is not involved, the restriction would only need to be "viewpoint-neutral" and "reasonable in light of the purpose [served by] the forum[.]" *Perry Educ. Ass'n*, 460 U.S. at 49; *United States v. Grace*, 461 U.S. 171, 178 (1983).

Your opinion request references a person collecting signatures for an initiative request at a plaza in front of City Hall. The plaza would be considered a public forum if the city has intentionally opened the plaza "for use by the public as a place for expressive activity" or it has been traditionally open as such. *Perry Educ. Ass'n*, 460 U.S. at 45. These places occupy a special position in terms of First Amendment protection, and the government's ability to restrict expressive activity is limited. *Collier*, 121 Wn.2d at 747. In determining whether the plaza is open for such activity, courts will consider whether it is open to the public and the presence or absence of restrictions on public use of the property. *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011).

Courts also consider the purpose of the property. For example, a sidewalk leading to a post office may not be considered a public forum where the actual purpose of a postal sidewalk is to assist patrons in negotiating the space between the parking lot and the front door of the post office. *United States v. Kokinda*, 497 U.S. 720, 728-30 (1990) (plurality). Similarly, an airport terminal may not be a public forum because its principal purpose is the facilitation of passenger air travel, not the promotion of expression. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682-83 (1992). As these cases demonstrate, these inquiries are very fact-specific.

In *Capitol Square Review & Advisory Board*, the U.S. Supreme Court used this analysis in determining that the plaza at issue in the case was a traditional public forum because it had been used for over a century "for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995). Thus, if the city property you contemplate has been traditionally or

intentionally held open for public expression, it is likely a public forum. Ultimately, the inquiry as to whether a specific government property would be considered a public forum, and in turn, whether the government may prohibit signature gathering on that property, is very fact specific.

I trust the foregoing will be useful to you. This is an informal opinion and will not be published as an official Attorney General Opinion.

s/ Debra Lefing
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